

DOCKET FILE COPY ORIGINAL

RECEIVED

APR 25 1997

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554
Federal Communications Commission
Office of Secretary

In the Matter of)
)
Implementation of the) CC Docket No. 96-152
Telecommunications Act of 1996:)
)
Telemessaging,)
Electronic Publishing, and)
Alarm Monitoring Services)

REPLY COMMENTS OF SBC COMMUNICATIONS, INC.

SBC Communications, Inc. ("SBC"), by its attorneys, files these brief reply comments regarding the Commission's Further Notice of Proposed Rulemaking ("FNPRM") in the above-referenced matter.

In its Section 274 Order, the Commission concluded that "to be engaged in the provision of electronic publishing services subject to section 274, the BOC must disseminate the information via its basic telephone service...and have control of, or a financial interest in, the content of the information being provided."¹ The FNPRM sought further comment on the meaning of the terms "control" and "financial interest."

SBC's initial comments urged that the Commission defer interpreting these terms or

¹Implementation of the Telecommunications Act of 1996: Telemessaging, Electronic Publishing and Alarm Monitoring Services, CC Docket No. 96-152, released February 7, 1997 ("Section 274 Order"), para. 56.

adopting any specific control/financial interest criteria.² The various opinions expressed in the few comments filed support SBC's view -- both the Commission and the still-evolving electronic publishing industry would be better served by a case-by-case analysis as concrete, specific fact patterns or actual offerings arise. Otherwise, the Commission runs a great risk of running afoul of the multitude of statutory exceptions to the definition of electronic publishing,³ and of stunting the meaningful participation of BOCs in the electronic publishing industry which Congress intended for them.

Only one commentator appears to have urged the Commission to interpret "control" broadly. Yet that commentator, AT&T, proposed no specific definition or criteria to guide the Commission, while agreeing that any arrangements that might give rise to a "financial interest" would require a fact-specific analysis.⁴ Given this record, the Commission should simply adopt a case-by-case approach for interpreting both of these terms, as it did for deciding how it would classify a service that does not fit squarely within either the definition of electronic publishing or one of the exceptions to that definition.⁵

²SBC, 3-4.

³Section 274(h)(2), subparagraphs (A) through (O).

⁴AT&T, 4.

⁵Section 274 Order, para. 48; SBC, 3. To the extent, however, that the Commission embarks on the formulation of specific control/financial interest criteria, it should focus on whether the BOC has the ability to generate or alter the content of the information presented, as Congress intended. SBC departs from US West's view that additional functions (e.g., compilation, collection) should be encompassed within the definition of electronic publishing. US West, 6-8. Nothing indicates that Congress sought to engraft these additional functions onto

(continued...)

AT&T also endorses the FNPRM's "proposal" that, if a BOC attempts to "limit the types of information to which its gateway connects," the BOC has exercised the requisite degree of control necessary to trigger application of Section 274.⁶ Initially, it should be recognized the FNPRM did not propose any such thing. Rather, it simply asked for comment on a question, and did not suggest the Commission was proposing anything.⁷

More to the point, AT&T's attempt to hamstring the BOCs' provision of gateway services, which Section 274(h)(2)(C) expressly excepts from the definition of electronic publishing, should be rejected. As SBC pointed out in its initial comments, the statutory limitation applicable to a gateway service is that it not involve "the generation or alteration of the content of information."⁸ AT&T's position advances a limitation far broader than that which Congress explicitly chose to place on the gateway service exception (indeed, the same one it placed within three other statutory exceptions⁹). There is no justifiable reason to second-guess Congress in this matter, and AT&T offers none.

⁵(...continued)

the limitation stated within the gateway, and other, exceptions. As SBC explained, they are quite distinct from the functions of generating or altering information. Consequently, functions such as compilation, abstraction, formatting and placement of information, which do not alter the substance or meaning of the communication, should not be interpreted as "control" of the content. SBC, 6-7.

⁶AT&T, 3.

⁷Section 274 Order, para. 244.

⁸SBC, 5-6.

⁹See, Section 274(h)(2), subparagraphs (E), (M) and (N), noted at SBC, 5.

AT&T's position that limiting the types of information to which its gateway connects makes the BOC an electronic publisher may be likened to concluding that if Federal Express were to refuse to deliver a particular magazine or newspaper, then Federal Express would be deemed the publisher of that magazine or newspaper. The more reasonable and logical position is that, as BellSouth and Ameritech point out, a BOC should be free to determine how to most effectively provide a gateway service that is convenient, meaningful and useful to end users.¹⁰ Thus, SBC agrees that "access control functions of a gateway must be distinguished from the content control that is a characteristic of electronic publishing."¹¹

Similarly, remuneration for providing the gateway service does not constitute a financial interest in electronic publishing.¹² That the gateway may direct an end user to a particular site is beside the point. It is the owner of that site, not the BOC, who controls (i.e., generates or alters) its content.

Finally, AT&T invites the Commission to affirm "that so long as a BOC's electronic publishing service truly serves only as a gateway, that service need not be provided via a [Section] 274 affiliate or joint venture."¹³ The invitation is much too limited. As noted previously, Section 274(h)(2) states fourteen other exceptions to the definition of electronic publishing; so long as a BOC's activities fall within any of the Section 274(h)(2) exceptions,

¹⁰Ameritech, 2; BellSouth, 2-4.

¹¹BellSouth, 3.

¹²This appears to have been so even under the MFJ. See, Ameritech, 4.

¹³AT&T, 4.

including, but not limited to, provision of a gateway, the BOC is not required to comply with the requirements of Section 274.

In conclusion, SBC urges the Commission to proceed cautiously in this matter and to not now adopt any specific control/financial interest litmus test or criteria. To the extent it does otherwise, the Commission should stay true to Congress' expressed intent as shown in these and SBC's initial Comments.

Respectfully submitted,

SBC COMMUNICATIONS INC.

By 

James D. Ellis
Robert M. Lynch
David F. Brown
Patrick J. Pascarella
175 E. Houston, Room 1254
San Antonio, Texas 78205
(210) 351-3478

Marlin D. Ard
Patricia L.C. Mahoney
Keith J. Epstein
140 New Montgomery St., Room 1525
San Francisco, California 94105
(415) 545-7183

ATTORNEYS FOR SBC
COMMUNICATIONS INC.

Durward D. Dupre
Michael J. Zpevak
Robert J. Gryzmala
One Bell Center, Room 3520
St. Louis, Missouri 63101
(314) 235-2507

ATTORNEYS FOR SOUTHWESTERN BELL
TELEPHONE COMPANY

April 25, 1997

CERTIFICATE OF SERVICE

I, Katie M. Turner, hereby certify that the foregoing, "REPLY COMMENTS OF SBC COMMUNICATIONS INC." in Docket No. 96-152 has been filed this 25th day of April, 1997 to the Parties of Record.

A handwritten signature in cursive script that reads "Katie M. Turner". The signature is written in dark ink and is positioned above a horizontal line.

Katie M. Turner

April 25, 1997

ITS INC
1919 M STREET NW
ROOM 246
WASHINGTON DC 20554

JANICE MYLES
FCC
COMMON CARRIER BUREAU
1919 M STREET NW RM 544
WASHINGTON DC 20554

DOROTHY CONWAY
FEDERAL COMMUNICATIONS COMMISSION
1919 M STREET NW - RM 234
WASHINGTON DC 20554

TIMOTHY FAIN
OMB DESK OFFICER
10236 NEOB
725 - 17TH ST NW
WASHINGTON DC 20503

KATHRYN MARIE KRAUS
U S WEST INC
1020 19TH ST NW STE 700
WASHINGTON DC 20036

PETER ARTH JR
EDWARD W O'NEILL
ATTORNEYS FOR THE PUBLIC UTILITIES
COMMISSION OF THE STATE OF CALIFORNIA
505 VAN NESS AVENUE
SAN FRANCISCO CA 94102

LAWRENCE W KATZ
BELL ATLANTIC TELEPHONE COMPANIES
1320 NORTH COURT HOUSE ROAD
8TH FLOOR
ARLINGTON VA 22201

JOHN F NATOLI
NYNEX CORPORATION
35 VILLAGE ROAD
MIDDLETON MA 01949

M ROBERT SUTHERLAND
A KIRVEN GILBERT III
1155 PEACHTREE ST NE
ATLANTA GA 30309-3610

MARK C ROSENBLUM
AVA B KLEINMAN
AT&T CORP
295 NORTH MAPLE AVENUE
BASKING RIDGE NJ 07920

MARY McDERMOTT
LINDA KENT
UNITED STATES TELEPHONE ASSOCIATION
1401 H STREET NW STE 600
WASHINGTON DC 20005

MARLIN D ARD
LUCILLE M MATES
PACIFIC TELESIS GROUP
140 NEW MONTGOMERY ST RM 1529
SAN FRANCISCO CA 94105

BRIAN CONBOY
SUE D BLUMENFELD
WILLKIE FARR & GALLAGHER
THREE LAFAYETTE CENTRE
1155 21ST STREET NW
WASHINGTON DC 20036

DANNY E ADAMS
STEVEN A AUGUSTINO
KELLYE DRYE & WARREN LLP
1200 19TH ST NW
WASHINGTON DC 20036

FRANK W KROGH
DONALD J ELARDO
MCI TELECOMMUNICATIONS CORPORATION
1801 PENNSYLVANIA AVE NW
WASHINGTON DC 20006

DAVID J BROWN
SENIOR VICE PRESIDENT/PUBLIC POLICY AND
GENERAL COUNSEL
NEWSPAPER ASSOCIATION OF AMERICA
529 14TH ST NW STE 440
WASHINGTON DC 20045-1402

MARY E BURGESS
ASSISTANT COUNSEL
STATE OF NEW YORK DEPARTMENT OF
PUBLIC SERVICE
THREE EMPIRE STATE PLAZA
ALBANY NY 12223-1350

FRANK MICHAEL PANEK
RICHARD HETKE
COUNSEL FOR AMERITECH
2000 WEST AMERITECH CENTER DR
ROOM 4H84
HOFFMAN ESTATES IL 60196-1025